Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-1925

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

****

THE STATE OF FLORIDA, Petitioner,

vs.

KEITH JONES, a/k/a TOMMY JONES, Respondent.

****

Respondent Keith Jones's Brief in Opposition
to Petition for Writ of Certiorari
to the District Court of Appeal of Florida,
Third District

****

DAVID J. FINGER, ESQUIRE
Counsel of Record for Respondent
2534 S. W. 6th Street
Miami, Florida 33135-2926
(305) 643-0101

Of Counsel:

HOWARD SOHN, ESQUIRE
2534 S. W. 6th Street
Miami, FL 33135-2926
(305) 643-0101

QUESTION PRESENTED

Whether police officers interrogated the Respondent in violation of the Fifth and Fourteenth Amendments to the United States Constitution when, subsequent to the Respondent's invocation of his right to counsel, they initiated contact with the Respondent by unilaterally intruding into his private telephone conversation with his mother and informing the Respondent and his mother of the charges the Respondent was facing, the evidence and witnesses against him, that the police knew the Respondent was involved in and his co-defendant had implicated him in the homicide, and that the police wanted to talk to the Respondent and obtain a statement from him.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
Whether police officers interrogated the Respondent in violation of the Fifth and Fourteenth Amendments to the United States Constitution when, subsequent to the Respondent's invocation of his right to counsel, they initiated contact with the Respondent by unilaterally intruding into his private telephone conversation with his mother and informing the Respondent and his mother of the charges the Respondent was facing, the evidence and witnesses against him, that the police knew the Respondent was involved in and his co-defendant had implicated him in the homicide, and that the police wanted to talk to the Respondent and obtain a statement from him.	
TABLE OF AUTHORITIES	iii
STATEMENT OF ACCEPTANCE	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	14

TABLE OF AUTHORITIES

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)	3, 4
Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981)	3, 4
Rhode Island v. Innis, 446 U.S. 291 (1980)	3, 4, 5
Arizona v. Mauro, 55 U.S.L.W. 4601 (U.S. May 4, 1987)	8

STATEMENT OF ACCEPTANCE

The Respondent would accept the Petitioner's statements as delineated in the Preface, Opinion Below, Jurisdiction, and Constitutional Provisions Involved sub-headings as included in the Petitioner's Brief on Jurisdiction.

STATEMENT OF THE CASE

The Respondent, Keith Jones, would accept the Petitioner's recitation of the statement of the case as detailed in pages six through nine of the Petitioner's jurisdictional brief filed in the instant cause, however, would respectfully supplement the statement of the case by including and directing this Court's attention to the lower court's opinion reversing the Respondent's convictions, specifically Appendix 9 through 13, inclusive, wherein the Third District Court of Appeal cited specific questions and answers on cross-examination from the homicide detectives of the City of Miami Police Deparment intimately involved in the interrogation of the Respondent herein, as a factual basis for its holding that the police initiated contact with the Respondent, Keith Jones, after he had invoked his right to counsel, in violation of Edwards, Innis, and Miranda.

REASONS FOR DENYING THE WRIT

The state of Florida's Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District, should be summarily denied by this Court, for it is evident from a review of the lower court's opinion and factual record in support thereof that the Third District Court of Appeal's opinion reversing the trial court's denial of the Respondent's Motion to Suppress Statements, Admissions, and/or Confessions was both legally and factually proper and correct and completely in accord with this Court's decisions rendered in Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966), Edwards v. Arizona, 451 U.S. 477, 485, 101 S. Ct. 1880, 1884, 68 L.Ed.2d 378, 386 (1981), and Rhode Island v. Innis, 446 U.S. 291 (1980).

It is axiomatic that "if the accused indicates that he wishes to remain silent, the interrogation must cease. If he requests counsel, the interrogation must cease until an attorney is present." Miranda v.

Arizona, supra at 474; Edwards v. Arizona, 451 U.S. 482, 101 S. Ct. 1880, 1883 (1981).

As this Court further stated in Edwards v. Arizona,

> When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he (defendant) responded to further police initiated custodial interrogation even if he has been advised of his rights. [Emphasis added].

Edwards at page 1885.

Additionally, as this Court has uniformly held in Edwards and its progeny, "an accused is not subject to further interrogation by law enforcement authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Edwards at page 1885.

In Rhode Island v. Innis, wherein this Court was called upon to define the meaning and parameters of the term "interrogation," this Court stated:

> We conclude that the Miranda safeguards come in to play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say the term interrogation under Miranda refers not only to express questioning, but also to any words or actions on the part of the police, other than those normally attendant to arrest and custody, that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect rather than the intent of the police. This focus reflects the fact the Miranda safeguards were designed to invest a suspect in custody with an added measure of protection against coercive police practices without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to invoke an incriminating response from a suspect thus amounts to interrogation. But since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of the police officers that they should have known were reasonably likely to elicit an incriminating response. [Emphasis added].

Rhode Island v. Innis, 100 S. Ct. at 1689-90.

While allegedly cognizant of this Court's pronouncements in Edwards, Miranda, and Innis, the Petitioner, as it did in the Third District Court of Appeal and Supreme Court of Florida, unfortunately relies upon an erroneous and selective review of the record in continuing to assert to this Court as well that the Respondent initiated contact with the police and the officers' actions did not constitute interrogation or its functional equivalent under prevailing case law.

Unfortunately for the Petitioner, a cursory review of the opinion of the Third District Court of Appeal (attached hereto as an appendix), and specifically pages 9 through 13 thereof, unquestionably belies such assertions.

Specifically, after the Respondent had unequivocably invoked his right to counsel and was engaged in a private telephone conversation with his mother, Detective Gary Jackson of the Miami Police Department initiated contact with Keith Jones by unilaterally intruding into this private telephone conversation.

[App. 11]. Thereafter, with the Respondent, his mother, Detective Meeks and Detective Jackson all parties to this telephone conversation and subsequent to the Respondent's invocation of his right to counsel, Detective Jackson advised both the Respondent and his mother that he wanted to take a statement from the Respondent, Keith Jones. [App. 10].

Further, Detective Jackson advised both the Respondent and his mother what the evidence was against him (Keith Jones), [App. 10], that Keith had been implicated in the murder by a co-defendant, [App. 10], that Keith Jones was already arrested for kidnapping, [App. 12], and would be arrested for the murder [App. 12].

Not surprisingly, after this initiation of contact with the Respondent, and without attempting to assist the Respondent obtain an attorney or advising his mother that Keith had requested an attorney, [App. 13], the Respondent was questioned further and a statement was obtained from him.

It is this factual scenario and express questioning of the Respondent subsequent to his invocation of his right to counsel that compelled the Third District Court of Appeal to reverse the trial court's denial of the Respondent's Motion to Suppress Statements, Admissions, and/or Confessions in the instant case.

Further, notwithstanding the protestations of the Petitioner to the contrary, this Court's recent decision in Arizona v. Mauro, 55 U.S.L.W. 4601 (U.S. May 4, 1987), does not present a factual scenario strikingly similar to that presented in the instant case and does not in any manner whatsoever require the granting of the Petitioner's Writ of Certiorari.

In Mauro, a situation is presented where an alleged child killer, after making certain voluntary admissions, invokes his right to counsel, whereupon all questioning ceases with Mauro secured and held in the office of the police captain.

Simultaneously therewith, Maruo's wife was being questioned in another room by a police detective, and

upon finishing such questioning with the detective, requested and then insisted that she be allowed to converse with her husband.

During this brief tape recorded conversation wherein Detective Manson was present, Mr. Mauro advised his wife to invoke her constitutional rights and not answer any questions until an attorney was present.

Further, in this extremely brief conversation, included as a footnote to this Court's opinion, Detective Manson only minimally participated by inquiring of Mrs. Mauro if she knew a reverend or priest or someone who can talk to and/or take care of her husband and briefly thereafter requested if Mrs. Mauro wished to talk to her husband any further, to which she again replied, no. At this point the brief conversation was terminated.

Based upon the foregoing facts and circumstances, this Court held that Mauro was not subjected to compelling influences, psychological ploys, or direct questioning or its functional equivalent under Rhode

Island v. Innis, and thus his volunteered statements cannot properly be considered the result of police interrogation.

A review of the facts of the instant case unquestionably highlights their dissimilarity with the facts in Mauro and reaffirms the propriety of the lower court's opinion and conclusion that Detective Jackson's remarks and statements to the Respondent's mother were designed to have the same coercive effect on the Respondent as if they had been spoken directly to him and as a consequence fall within the Innis condemnation. [App. 14].

In the instant case, unlike Mauro, it was the police who unilaterally, without permission and/or consent, subsequent to the Respondent invoking his right to counsel, intruded into a private telephone conversation with the Respondent and his mother, and without requesting or suggesting that the Respondent not participate in the conversation, proceeded to advise both the Respondent and his mother that the detectives wanted

to take a statement and question the Respondent. The detectives further advised the Respondent and his mother what the evidence was against him, that he had been implicated in the murder by the co-defendant, that he was already charged with kidnapping and would be charged with murder as well, and further failed to inform the Respondent's mother that the Respondent had already requested the assistance of an attorney.

This police intrusion into the Respondent's private telephone conversation with his mother and extensive involvement in said conversation, as well as their statements made to the Respondent and his mother, coupled with the lack of necessity for the initial and prolonged intrusion into said conversation by the detectives and their unsolicited statements concerning the charges and evidence, were all carefully considered and analyzed by the lower court in concluding that "it is unlikely that Jones recognized the sophisticated technique by which police sought to elicit his confession," [App. 13], and clearly serve to distinguish the instant case from the Mauro case relied on by the Petitioner in this case.

While conceding and acknowledging that the police officers in the instant case acted reasonably and lawfully in allowing the Respondent to speak to his mother, it is incomprehensible for the Petitioner to suggest that the subsequent unsolicited actions of the homicide detectives in intruding into that telephone conversation and initiating contact with the Respondent herein were proper, lawful, and/or reasonable under prevailing Supreme Court case law.

Based upon the foregoing, the Third District Court of Appeal properly held that in "applying the principles enunciated in Edwards, Innis, and Miranda to the record before us, we find that the police initiated contact with Jones after he had invoked his right to counsel and that his confession to the Daugherty homicide logically resulted from their intimidating message ostensibly directed to his mother," and accordingly reversed the trial court's denial of the Respondent's pretrial Motion to Suppress Statements, Admissions, and/or Confessions and in permitting its introduction at trial. [App. 9, 15].

Although commending the Petitioner for its efforts, it is evident, based upon the holding/decision of the Third District Court of Appeal, as affirmed by the Supreme Court of Florida in denying certiorari, that the Petitioner has failed to establish a lawful basis for the invocation of this Court's jurisdiction and their petition for a writ of certiorari must be summarily denied by this Court in all respects.

CONCLUSION

Clearly, based upon a careful and studied review of the foregoing authorities, factual record, and lower court opinion, the Respondent, Keith Jones, would strongly urge this Court to deny the Petition for Writ of Certiorari and deny certiorari jurisdiction in this case.

Respectfully submitted,

DAVID FINGER, ESQUIRE
Counsel for the Respondent
2153 Coral Way
Suite 401
Miami, Florida 33145
(305) 856-2718

BY: _____
DAVID FINGER

OF COUNSEL:

_____
HOWARD SOHN, ESQUIRE
2534 S. W. 6th Street
Miami, FL 33135-2926
(305) 643-0101

****

APPENDIX TO

RESPONDENT'S BRIEF IN OPPOSITION

****

INDEX

Opinion of the District Court of Appeal
of Florida, Third District
November 4, 1986 App. 1

App.1

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1986

CASE NO. 79-1138

KEITH A. JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed November 4, 1986.

An Appeal from the Circuit Court for Dade County, Arthur I. Snyder, Judge.

Bennett H. Brummer, Public Defender, and Howard Sohn, Special Assistant Public Defender, for appellant.

Jim Smith, Attorney General, and Debora J. Turner, Assistant Attorney General, for appellee.

Before NESBITT, BASKIN AND DANIEL S. PEARSON, JJ.

PER CURIAM.

On January 26, 1985, at approximately 6:00 p.m., two males kidnapped Franklin Morrison, robbed him, and fled in his car. At approximately 9:00 p.m., driving the same car, two males robbed, shot, and killed Merlene Daugherty. On January 28, 1985, police stopped Morrison's car and arrested its occupants for grand theft of the Morrison car. The car's occupants included defendant seventeen-year-old Keith Jones and a codefendant who is not a party to this appeal. On the morning of January 29, 1985, presented with a photographic lineup, Morrison identified the codefendant and Jones as the individuals who had robbed him. Later that day, the codefendant named Jones as a participant in the robbery and murder of Merlene Daugherty. The police then informed

Jones that they had information implicating him in the Daughtery homicide. After receiving his Miranda rights, Jones initialed the standard constitutional rights warning form, indicating that he was unwilling to speak to police in the absence of an attorney. At that point, the police arrested Jones for the Morrison armed robbery and kidnapping.

Jones requested permission to telephone his mother. While Jones was speaking to his mother, Detective Jackson picked up an extension phone and identified himself as a police officer; Detective Meeks listened to the conversation on another extension. During the phone call, Detective Jackson informed both Jones and his mother of the charges and evidence against

Jones. When the call ended, Jones signed a waiver of his right to counsel and confessed his involvement in the Daugherty murder.

Jones was charged with first-degree murder, two counts of armed robbery, two counts of unlawful possession of a firearm while engaged in a criminal offense, armed kidnapping, and aggravated battery. He filed a pretrial motion to suppress his confession on the ground that it had been obtained in response to custodial interrogation after he had invoked his right to counsel. The state disagreed, asserting that Jones had initiated contact with police, thereby waiving his right to counsel. The trial court denied the motion to suppress. In addition, the court denied Jones' pretrial motion for

severance of offenses and for separate trials based on improper joinder of the two criminal episodes.

At trial, testimony indicated that Jones was in the car when the codefendant shot Daugherty. During the charge conference, defense counsel asked the court to instruct the jury as to second-degree felony-murder, a lesser included offense of first-degree murder, in accordance with the holding in State v. Lowery, 419 So.2d 621 (Fla. 1982), which permits the jury to return a verdict of second-degree felony-murder even though the defendant was not present at the scene of the crime. The court denied the request, and instead, instructed the jury that the defendant had to be present to be found guilty of second-degree murder. At the conclusion

of the trial, the jury found Jones guilty as to all counts except aggravated battery. Following the trial court's entry of adjudications and sentences, Jones instituted this appeal.

We find merit in only three of the points raised on appeal; 1) whether the trial court erred in refusing to suppress Jones' confession, 2) whether the trial court committed error in its second-degree felony-murder instruction, and 3) whether the trial court erred in denying Jones' pretrial motion to sever the offenses and to conduct separate trials of the charges resulting from the two criminal episodes. We answer all three questions in the affirmative.

Addressing the admissibility of Jones' confession, we direct our attention to pertinent case law. In

Miranda v. Arizona, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966), the Supreme Court ruled that the prohibition against compelled self-incrimination requires police to advise arrestees of their rights to remain silent and to obtain or be furnished counsel. The Court held that when an accused indicates that he wishes to consult with counsel, interrogation must cease until an attorney is present. Miranda, 384 U.S. at 47, 486 S.Ct. at 1627, 16 L.Ed.2d at 723.

The Court reiterated and expanded its views in Edwards v. Arizona, 451 U.S. 477, 485, 101 S.Ct. 1880, 1884, 68 L.Ed.2d 378, 386 (1981). Recognizing that a defendant may choose to waive his rights and respond to police interrogation, the Court established

safeguards to insure that post-Miranda waivers are voluntary. The Court provided that the state may not prove a waiver merely by introducing a defendant's response to police-initiated interrogation; instead, the state must demonstrate that the defendant abandoned an earlier request for counsel and resumed or initiated communication with police of his own volition.

Miranda procedural safeguards apply to custodial interrogation whether it appears as direct questioning or in the form of its functional equivalent. Innis v. Rhode Island, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). The term "interrogation" under Miranda "refers not only to express questions, but also to any words or actions on the part of the police . . . that the police

should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301, 100 S.Ct. at 1689-90, 64 L.Ed.2d at 308.

Applying the principles enunciated in Edwards, Innis, and Miranda to the record before us, we find that the police initiated contact with Jones after he had invoked his right to counsel, and that his confession to the Daugherty homicide logically resulted from their intimidating message, ostensibly directed to his mother. During defense counsel's cross-examination, Detective Jackson admitted that he informed Mrs. Jones of the charges and evidence against her son while Jones listened on the extension.

> [DEFENSE ATTORNEY] So, there is [sic] four people on the telephone now; Keith Jones, Mrs. Jones, his mother, you and Detective Meeks; is that correct?

A. That's correct.

Q. In that conversation you advised Mrs. Jones that you wanted to take a statement from Keith, didn't you?

A. I told her that -- I told her that we wanted to speak to him, yes.

Q. That you wanted to take a statement from him?

A. That we wanted to speak to him.

Q. You never told Keith Jones' mother that you wanted to take a statement from him?

A. In those words, possibly yes.

Q. That you wanted to talk to him?

A. Yes.

Q. You told her that the evidence was against him?

A. Yes.

Q. That he'd been implicated in the murder by [codefendant]?

A. Yes.

Q. You told her what the charges were?

A. Yes.

Q. This is with Keith on the telephone?

A. Yes.

Detective Meeks testified similarly:

[DEFENSE ATTORNEY] According to your testimony, that was Detective Gary Jackson that volunteered or suggested to Keith [Jones] that he get on the phone and talk to his mother?

A. Yes.

Q. Jackson initiated the contact then, not Keith Jones?

A. Yes.

Q. Is that correct?

A. Yes.

Q. That's when Jackson identified himself as a police officer?

A. Yes

Q. Now, when he spoke to Keith -- when he spoke to the mother

on the phone, Keith was still on the extension, wasn't he?

A. Yes, I believe so.

Q. Isn't it a fact that Keith was on the extension for the entire time that Jackson was talking to Keith's mother?

A. I think he was, yes.

Q. You think he was. Wasn't he?

A. I think he was, yes.

Q. Jackson said that Keith was arrested for the kidnapping; correct?

A. Yes.

Q. Possibly be arrested for the murder?

A. Yes,

. . . .

Q. Also as far as what evidence they had against Keith, you told this to the mother, right?

A. Yes.

Q. You were telling it to Keith because he was on the phone, too?

A. Yes.

Q. Did you consider this questioning of Keith Jones?

A. Did I consider it?

Q. Yeah.

A. No.

Q. Did you tell Keith Jones' mother that Keith had asked for a lawyer?

A. I didn't talk to the mother.

Q. Did Jackson tell her that?

A. I can't recall whether he did or not.

In condemning the type of police conduct employed here, Innis focused on the perception of the accused rather than the subjective intent of the police officer. It is unlikely that Jones recognized the sophisticated technique by which police sought to elicit his confession. Furthermore, Detective

Jackson, having failed to tell Mrs. Jones that her son had requested and was entitled to an attorney, could reasonably expect Mrs. Jones to instruct her teenaged son to cooperate with police. Jackson's remarks to Mrs. Jones were designed to have the same coercive effect on Jones as if they had been spoken directly to him, and as a consequence, fall within the Innis condemnation.

The minimal safeguards provided by Edwards, Innis, and Miranda are, of course, afforded to defendants by Florida courts: see Smith v. State, 492 So.2d 1063 (Fla. 1986); State v. Madruga-Jiminez, 485 So.2d 462 (Fla. 3d DCA), review denied, 492 So.2d 1335 (Fla. 1986); State v. Echevarria, 422 So.2d 53 (Fla. 3d DCA 1982), review

denied, 434 So.2d 889 (Fla. 1983); Tierney v. State, 404 So.2d 206 (Fla. 2d DCa 1981); Lornitis v. State, 394 So.2d 455 (Fla. 1st DCA 1981); see also State v. Garcia, 422 So.2d 926 (Fla. 3d DCA 1982); Singleton v. State, 344 So.2d 911 (Fla. 3d DCA 1977). These authorities mandate a holding that the trial court committed reversible error in denying Jones' pretrial motion to suppress his confession and in permitting its introduction at trial.

In the second point raised, Jones challenges the trial court's instruction to the jury. We find error on this point as well. The trial court should have modified the standard jury instruction on second-degree felony-murder to comport with the mandate of

Lowery.[1] Under Lowery, the jury may return a verdict of second-degree felony-murder even though the defendant was not present at the scene of the crime. Because the trial court's erroneous instruction required the jury to find that Jones was present at the scene of the crime before it could return a verdict of the lesser crime of second-degree murder, the use of the erroneous instruction curtailed the possibility of a lesser verdict.

We also find error in the trial

---

[1] Although the standard jury instructions on second-degree felony-murder in existence at the time of the trial did not reflect the Lowery holding, the supreme court decided Lowery prior to the trial, and it was available to the trial court. The supreme court subsequently amended the standard jury instruction in accordance with the Lowery holding. The Florida Bar re: Standard Jury Instructions Criminal Cases, 477 So.2d 985 (Fla. 1985).

court's denial of Jones' motion for severance of offenses and for separate trials of the charges which arose from the two criminal episodes. The supreme court held in State v. Williams, 453 So.2d 824, 825 (Fla. 1984) (citing Paul v. State, 365 So.2d 1063, 1065 (Fla. 1st DCA 1979) (Smith, J., dissenting)), "that consolidation [of offenses] is improper when 'based on similar but separate episodes, separated in time, which are "connected" only by similar circumstances and the accused's alleged guilt in both and all instances.' 365 So.2d at 1065-66, adopted 385 So.2d at 1372." The supreme court's interpretation of Florida Rule of Criminal Procedure 3.150(a) in both Williams and Paul mandates the severance of offenses and separate trials where, as here, the

only connection between the two criminal episodes was the use of a stolen car and the accused's alleged participation. See McMullen v. State, 405 So.2d 479 (Fla. 3d DCA 1981); Macklin v. State, 395 So.2d 1219 (Fla. 3d DCA 1981); cf. Green v. State, 408 So.2d 1086 (Fla. 4th DCA 1982) (severance not required when two criminal acts take place in same area within seconds of each other).

For these reasons, we reverse the judgments and remand for further proceedings consistent with this opinion.

Reversed and remand.